he had not on such occasions worn or asked for a safety belt.

In the circumstances, as Viscount Kilmuir L.C. said: "It was clearly open to a court to infer that the deceased would not have worn a safety belt even if it was available."

In the instant case, there is not a scrap of evidence to suggest that the operators of the machine would dispense with the use of the guard while operating it, nor any evidence that the plaintiff had discarded it while engaged in such operation. He was only an apprentice, not an experienced worker, and had been at this type of work for only one month. There is nothing in the evidence in the present case to warrant the inference that the plaintiff would not have used the guard if one was provided. The defendants are solely liable.

On the question of damages, I allow the plaintiff his agreed special damages under the heading "Particulars of special damages" amounting to a sum of $318.

As regards general damages, Mr. Cashin makes no claim for loss of future earnings, and so taking into consideration all other relevant factors I would assess the general damages at $3,000.

There will be judgment for the plaintiff in the sum of $3,318.

The plaintiff will have the costs of the action.

Judgment for the plaintiff.

Solicitors: *Murphy & Dunbar; Joseph & Son.*

CHONG THAIN VUN v. WATSON & ANOR.; HAMID DATUN v. MAJANGGIL & ANOR.; RICHARD E. YAP v. TUN DATU MUSTAPHA BIN DATU HARUN

[O.C.J. (Lee Hun Hoe J.) September 26, 1967]

[Jesselton — Election Petitions Nos. 1, 2 and 4 of 1967]

Election Petition — Personal service — Failure to serve notice of presentation of petition within 10 days — Publication in Gazette mandatory — Publication in Gazette outside period — Service condition precedent to jurisdiction — Extension of time — No power to extend — Election Offences Ordinance, 1954, s. 38 — Election Petition Rules, 1954, rr. 12(2)(3) and 15 — Failure to deposit sufficient sum by way of security — Courts of Judicature Act, 1964, s. 7(2).

Statute — Construction of — Interpretation of words used — No power in court to fill in gaps.

Motions were taken out by the respondents (1st respondent in petitions Nos. 1 and 2) to set aside three election petitions and one common ground in all three petitions was that the notice of the petition was not served on the respondent within 10 days of the presentation of the petition in accordance with rule 15 of the Election Petition Rules, 1954. In petitions Nos. 1 and 4 another common ground was that the petitioner in each case had failed to deposit by payment to the proper officer a sufficient sum by way of security for costs as is required under rule 12(2) of the Election Petition Rules, 1954. Petition No. 4 had one additional ground, i.e. that the petition was not presented within 21 days of the publication of the result of the election in the *Gazette* in accordance with section 38 of the Election Offences Ordinance, 1954. The result of the election in petition No. 4 was published in the *Gazette* on May 10, 1967 and the petition was lodged with the registrar on May 31, 1967.

Held: (1) the Election Petition Rules are mandatory and require strict compliance therewith. Non-compliance with the provisions of the Rules or the Ordinance must necessarily result in a jurisdictional defect and the court has no power to entertain the petitions;

(2) Election Petition No. 4 was presented within time under section 38 of the Election Offences Ordinance, 1954;

(3) all three petitions must be set aside on the ground that the service of the notice of the petition was not effected in accordance with the provisions of rule 15 of the Election Petition Rules;

(4) in petitions Nos. 1 and 4 the petitions must also be set aside on the grounds of insufficiency of security required under the provisions of rule 12(2) of the Rules.

Per Curiam: (1) the court has no power to extend time unless there is express provision in the particular written law to that effect; (2) the court will not give effect to the authority of a statute by enforcing it indirectly in cases where it cannot be enforced directly.

Cases referred to:—

(1) *Ex parte Fallon & White* 101 E.R. 159, 161; 5 T.R. 283.

(2) *Williams* v. *Burgess & Anor.* (1849), 10 L.J. Q.B. 10; 12 Ad. & El. 635.

(3) *Re North, Ex parte Hasluck* [1895] 2 Q.B. 264 & 269.

(4) *Lester* v. *Garland* 15 Ves. Jr. 248.

(5) *Trow* v. *Ind Coope (West Midlands) Ltd. & Anor.* [1967] 3 W.L.R. 633 & 639.

(6) *Goldsmith's Co.* v. *West Metropolitan Railway Co.* [1904] 1 K.B. 145.

(7) *Steward* v. *Chapman* [1951] 2 K.B. 792, 793.

(8) *Isaacs* v. *Royal Insurance Co.* L.R. 5 Ex. 296.

(9) *In re Railway Sleepers Supply Co.* 29 Ch. D. 204.

(10) *Yong Kuan Teik* v. *Devan Nair* [1964] M.L.J. M.L.J. 456.

(11) *Williams* v. *Mayor of Denby & Ors.* (1879), L.R. 5 C.P.D. 135.

(12) *Yong Kuan Teik* v. *Devan Nair* [1965] 2 M.L.J. 162.

(13) *Devan Nair* v. *Yong Kuan Teik* [1967] 1 M.L.J. 261; [1967] 2 W.L.R. 846; [1967] 2 All E.R. 34, P.C.

(14) *Queen* v. *Justices of London & Anor.* [1893] 2 Q.B. 476.

(15) *Mayer* v. *Harding* (1867), L.R. 2 Q.B. 410 & 411.

(16) *Morgan* v. *Edwards* (1860), 29 L.J.M.C. 108.

(17) *Magor & St. Mellons Rural District Council* v. *Newport Corporation* [1952] A.C. 189 & 190.

(18) *Assam Railways & Trading Co. Ltd.* v. *Inland Revenue Commissioners* [1935] A.C. 455 & 458.

(19) *Seaford Court Estates Ltd.* v. *Asher* [1949] 2 K.B. 481 & 498.

(20) *R.* v. *Armitage* (1872), L.R. 7 Q.B. 773 & 775.

(21) *Barker* v. *Palmer* (1881), 8 Q.B.D. 9 & 10.

(22) *Lee Lee Cheng* v. *Seow Peng Kwang* [1960] M.L.J. 1.

(23) *Khoo Hean Kee* v. *Chop Wong Soon Co.* [1964] M.L.J. 19.

(24) *Arzu* v. *Arthur* [1965] 1 W.L.R. 675 & 679.

(25) *Baber* v. *Gamson* 106 E.R. 940 & 942.

(26) *Girdlestone* v. *Allan* 108 E.R. 24 & 25.

(27) *In re Lamb* (1889), 23 Q.B.D. 477 & 480.

(28) *State of Madhya Pradesh* v. *Azad Bharat Finance Co.* A.I.R. 1967 S.C. 276.

(29) *Backwell's Case* (1683), 1 Vern. 152; 3 E.R. 381.

(30) *Baines* v. *Wormsley* (1878), 47 L.J. Ch. 844.

(31) *Re Eyre and Leicester Corporation* [1892] 1 Q.B. 136.

(32) *Sulaiman* v. *Choong Yoon Chong* [1957] M.L.J. 170.

(33) *Everitt* v. *Griffiths (No. 2)* [1923] 1 K.B. 130.

(34) *Buckley* v. *Walsh* (1899), 33 I.L.T. 121; 20 Digest 184.

(35) *Daly* v. *Monks* (1903), 37 I.L.T. 96; 20 Digest 185.

(36) *Redmond* v. *Manly* (1908), 42 I.L.T. 181; 20 Digest 185.

(37) *Walker* v. *Poole* (1882), 21 Ch. D. 835.

(38) *Hill* v. *Hart-Davies* (1884), 26 Ch. D. 470, C.A.

(39) *Re Jessopp* (1910), 54 Sol. Jo. 543, C.A.

ELECTION PETITIONS.

Dato' David Marshall (*Chong Thain Vun* with him) for the petitioners.

Dato' Eusoffe Abdoolcader (*W. K. Loo* with him) for the respondents other than the returning officers.

Au Ah Wah (Senior Federal Counsel) for the returning officers.

Cur. Adv. Vult.

Lee Hun Hoe J.: These motions arose out of the first direct election to the State Legislative Assembly held on various dates in April, 1967. In all cases applications were made for the dismissal of the petitions on various grounds. For convenience the three petitions were dealt with together.

In Election Petition No. 1 of 1967 (hereinafter referred to as petition No. 1) Chong Thain Vun and Dato' Khoo Siak Chiew were both candidates for the Sandakan Bandar constituency. Albert Watson, the returning officer was also made a respondent. The election was held on 8th April and Dato' Khoo was duly elected. Chong filed his petition on 30th May. There are two grounds for dismissal, namely,

(a) that the notice of the petition herein was not served on the 2nd respondent abovenamed within ten days of the presentation of the petition herein in accordance with rule 15 of the Election Petition Rules, 1954;

(b) that the petitioner herein has failed to deposit by payment to the proper officer sufficient sum by way of security for cost as is required under rule 12(2) of the Election Petition Rules, 1954.

In Election Petition No. 2 of 1967 (hereinafter referred to as petition No. 2) Hamid Datun and Salleh Sulong were both candidates for the Lahad Datu constituency. P. E. P. Majanggil the returning officer was also made a respondent. The election was held on 8th and 10th April and Sulong was duly elected. Datun filed his petition on 30th May. Here there is only one ground for dismissal. The ground is the same as (a) above.

In Election Petition No. 4 of 1967 (hereinafter referred to as petition No. 4) Richard Yap and Tun Mustapha were both candidates for the Bengkokka-Banggi constituency. Election was held on 8th, 10th and 11th to 18th, April, and Tun Mustapha was duly elected. Yap filed his petition on 31st May. In this case there are three grounds for dismissal. Two grounds are similar to those in petition No. 1. The third and additional ground reads:—

"That the petition herein was not presented within twenty-one days of the publication of the result in the *Gazette* in accordance with section 38 of the Election Offences Ordinance, 1954".

In all three petitions one common ground is that service of the notice is out of time. In petition No. 1 and petition No. 4 another common ground is that of insufficiency of security. Petition No. 4 has one additional ground, that is, that the petition was not presented within time. Counsel referred me to a considerable number of authorities. I am grateful for their assistance in these difficult matters. I have listened with much pleasure to their fascinating arguments. It would be impossible to refer to all the authorities but those which call for comment will be mentioned. I have also referred to authorities not cited but which I consider relevant.

During the hearing Dato' Marshall quite rightly complained, though he did not object, about the introduction of two matters by Dato' Abdoolcader. Certain fact relating to the payment of security in another election petition as yet to be heard had been brought in. I would disregard it completely as being irrelevant to the motions before me. Another more serious matter is the introduction of a new ground without proper notice. The ground is that the notices are null and void because they do not contain the names of the petitioners. In each notice Chong Thian Vun was mentioned as the advocate for the petitioner. He was an unsuccessful candidate in the Sandakan Bandar constituency and being an advocate he was

clearly acting for himself in petition No. 1. All the respondents' names were mentioned. Once a petitioner decides to effect service by publication in the *Gazette* he must comply with rule 15 of the Election Petition Rules, 1954 by stating "that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar." This was done in each notice. I think this ground was introduced as an afterthought as Dato' Abdoolcader did not press on very strongly with it. He must know that this ground stands on very thin ice. The introduction of new ground without proper notice is not only discourteous but also highly undesirable. I hold that this ground has no substance.

I will begin with the additional ground in petition No. 4. It was contended that the petition was not presented within time. The relevant part of section 38 of the Election Offences Ordinance, 1954 reads:—

"Every election petition shall be presented within twenty-one days of the date of publication of the result of the election in the *Gazette*."

It is common ground that the result of the election was published in the *Gazette* on 10th May, 1967. The petition was lodged with the Registrar on 31st May, 1967. It becomes important under the circumstances to ascertain whether the requirement of twenty-one days has been complied with. Whether the presentation of the petition was within twenty-one days depends, in my view, upon what is the proper mode of computation of time. The question is whether in computing time, the 10th May, the day of publication is to be included. If the answer is in the affirmative then the last day for the presentation of the petition would be 30th May and the petition would clearly be out of time. On the other hand if the 10th May is to be excluded then the last day would be 31st May and the petition would be within time.

Section 36(a) of the Interpretation and General Clauses Ordinance (Sabah) reads:—

"In computing time for the purpose of any State law, unless the contrary intention appears —

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done; . . . ."

The above provision does not apply to Federal matter. Although similar provision is to be found in the Interpretation and General Clauses Ordinance, 1948 (Federal), Dato' Abdoolcader submitted that it is not applicable because it has not been extended to Sabah like the Election Offences Ordinance, 1954 under article 73(2) of the Malaysia Act, 1963. The Interpretation Act, 1967 which applies to the whole of Malaysia does not help the court as section 2(2)(a) provides that the Act shall not apply to the interpretation of Acts of Parliament enacted before the commencement of this Act, that is, 19th April, 1967.

It was urged upon me to put on a construction of inclusiveness the word 'of' rather than exclusiveness unless the context shows otherwise as the proviso to the said section 38 the words "after" and "immediately after" are used. Dato Marshall pointed out that when the Election Offences Ordinance, 1954 was enacted the Interpretation and General Clauses Ordinance, 1948 (Federal) was already in force. I think this is important when one is trying to fathom the intention of the legislature. He submitted that the words "of" and "after" connote exclusiveness and cited *Ex parte Fallon & White* [1] and *Williams* v. *Burgess & Anor.* [2] In the latter case Lord Denman C.J. said:—

"This point is in fact decided by *Ex parte Fallon* the authority of which is not questioned. The statute in that case directed annuities to be enrolled within twenty days *of* the execution: here, warrants of attorney are to be filed within twenty-one days *after* the execution. There is no distinction between the two."

And to the use of different words in the same section *Maxwell* on Interpretation of Statutes, 11th Edition page 315 states:—

"But, just as the presumption that the same meaning is intended for the same expression in every part of an Act is, as we have seen, not of much weight, so the presumption of a change of intention from a change of language (of no great weight in the construction of any documents) seems entitled to less weight in the construction of a statute than in any other case, for the variation is sometimes to be accounted for by a mere desire to avoid the repeated use of the same words, sometimes by the circumstance that the Act has been compiled from different sources, and sometimes by the alterations and additions from various hands which Acts undergo in their progress through Parliament. Though the statute is the language of three estates of the realm, it seems legitimate in construing it to take into consideration that it may have been the production of many minds and that this may better account for any variety of style and phraseology which is found than a desire to convey a different intention. Even where the variation occurs in different statutes, the change is often not indicative of a change of intention."

In what manner should the court compute the twenty-one days?

In *re North, Ex parte Hasluck* [3] question arose regarding the computation of time under section 1 of the Bankruptcy Act, 1890 which provides that a debtor commits an act of bankruptcy if his goods are seized under an execution and have been either sold or held by the sheriff for twenty-one days. Vaughan Williams J. held that the sheriff must hold the goods for twenty-one whole days, in the computation of which the day on which the seizure was made was to be excluded. Dismissing the appeal Lord Esher M.R. made these observations:—

"Notwithstanding the elaborate array of authorities which have been cited to us, they seem on being sifted to contain no binding rule to the effect that time must be computed according to a hard and fast rule: that seems clear from the judgment in *Lester* v. *Garland*, [4] in which Sir William Grant, after a learned examination

of the whole subject, laid down what I conceive to be the wholesome view that no general rule exists. A great deal of difficulty has been caused in the administration of the law, and particularly of the common law, by decisions in which technical rules have been formulated which was not rule — that is, were not in accordance with the facts of the case. To say that by the common law a part of a day is the whole of a day is to say something which is contrary to the truth; it is a technical rule which was imposed upon the law with the result of bringing the law into disrepute. It is immaterial whether these older decisions were right in the particular cases; if they, or any of them, laid down any general rule as to the mode of computing time, that rule has been departed from in recent times and no longer exists."

Only recently *Lester* v. *Garland* [4] was quoted with approval in *Trow* v. *Ind Coope (West Midlands) Ltd. & Anor.*[5] where the Court of Appeal considered that in computing time Order 6 r. 8(1) of the Rules of the Supreme Court must prevail over the note on the writ. Lord Denning M.R. used these words:—

"But then there came the leading case of *Lester* v. *Garland*,[4] which considers cases like the present where a person must do something or take the consequences. Sir William Grant M.R. said that 'it would be more easy to maintain, that the day of an act done, or an event happening ought in all cases to be excluded, than that it should in all cases be included.' His reasoning was afterwards adopted by many great judges in the 19th century including Lord Tenterton and Parke B., and the earlier cases were disapproved. By the time we get to the 20th century Matthew L.J. was able to say in this court that 'The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded.'

See *Goldsmith's Company* v. *West Metropolitan Railway Co.*[6], which was followed by Lord Goddard C.J. in *Steward* v. *Chapman.*[7] Finally, in *Halsbury's* Laws of England, 3rd Edition (1962), *Vol. 37*, pages 92-99, we find all the cases analysed and the rule stated: 'The general rule in cases in which a period is fixed within which a person must act or take the consequences is that the day of the act or event from which the period runs should not be counted against him.' "

That there is no general rule in computing time is clear and each case must depend on its own circumstances and subject-matter. For this, reference may also be made to the judgment of Kelly C.B. in *Isaacs* v. *Royal Insurance Co.*[8] and that of Chitty J. in *In re Railway Sleepers Supply Co.*[9] There is no rule of law to compel a court to hold that a period of twenty days and a fraction of a day is the same as twenty-one days. In my judgment the 11th May should be calculated as the first day, that is, the exclusion of the 10th May in computing the twenty-one days. Accordingly the last day would be 31st May. I therefore hold that petition No. 4 was lodged within time.

One common ground in the three petitions is the service is out of time. As I have mentioned previously the result of the election was published on 10th May, 1967 in the *Gazette*. Petitions No. 1 and No. 2 were filed on 30th and petition No. 4 on 31st May, 1967. The notice of the election petitions were published in the *Gazette* on the 12th June, 1967. Under section 2 of the Elections Ordinance, 1958 *Gazette* is defined to mean in relation to elections to the Legislative Assembly, the Sabah Government *Gazette*. In Sabah the *Gazette* may be Ordinary or Extraordinary. The Ordinary *Gazette* is published twice a month, that is, on 1st and 15th, while urgent Government matters may be published in Extraordinary *Gazette* on any day of the month. Rules 10 and 15 of the Election Petition Rules, 1954 read:—

"10. Any person returned may at any time, after he is returned, send or leave at the office of the Registrar a writing, signed by him on his behalf, appointing an advocate to act as his advocate in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within Sabah at which notices addressed to him may be left, and if no such writing be left or address given, all notices and proceedings may be given or served by leaving the same at the office of the Registrar. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force.

15. Notice of the presentation of a petition, accompanied by copy thereof, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be affected either bv delivering the notice and copy aforesaid to the advocate appointed by the respondent under rule 10 of these Rules or by posting the same in a registered letter to the addressed given under rule 10 of these Rules at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address given, by a notice published in the *Gazette* stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar."

Before discussing the Rules, I would mention that because of special circumstances leave was granted for three deponents to be cross-examined. They are members of the Government Printing Department. Bernard Low, the chief lino-type operator/mechanic explained the faults of the five lino-type machines. He said on 3rd June three lino-type machines had been out of order for some time while two were operational but not working properly. As yearly check up of the machines were due he asked permission from the Government Printer to have the magazines of all the machines taken out for cleaning. Faults were also found on the two machines which were said to be operational. He was told to repair the machines as quickly as possible because of urgent matters. He knew nothing about the notices. He said he did not read materials sent to him for printing. Also such materials were sent to him in a docket. The setting up of the materials was done by other lino-type operators under him. Liew Sak Kiong, the superintendent of press explained his function in the Government Printing Department. When he returned from leave on 5th June he learned that the five lino-type machines were not functioning. According to him the Government Printer passed the notices to him either on

the 5th or 6th June with instruction to have them printed in a *Gazette* Extraordinary and to have the materials set up as soon as possible. The five lino-type machines were operational on 10th June at 10.00 a.m. The notices were set up then. The proof of the notices was shown to the Government Printer just before he left the office at noon. Being a Saturday the printing of the notices was not done until 12th June. These two witnesses are impressive. It is true they contradicted each other on certain matters which I consider minor. Where they conflict I prefer the evidence of Liew. These contradictions strengthen rather than weaken their evidence. I have no reason to disbelieve them.

Salleh bin Sariul, the Government Printer is the least impressive of the three. He has been working in that department for some 36 years and has risen to his present position from the rank. He was questioned about the *Gazette* Extraordinary dated 9th June, 1967. He explained that that particular *Gazette* was set up on 27th May after he had received the document from the clerk to the Legislative Assembly who informed him of the likely date of assent by His Excellency the Yang di-Pertua Negara and the appropriate date for publishing. Those dates were set up and ready but did not appear in the proof copy of the *Gazette*. The dates were put in after His Excellency the Yang di-Pertua Negara had actually given his assent to the bill. It is true Sariul has given contradictory answers during cross-examination on various matters but one does not assess the evidence merely on those contradictions which may be due to misunderstanding or confusion or other causes. In any case where his evidence conflicts with the other two witnesses I prefer the evidence of the latter.

Much has been made of the facts that the printing department is under the portfolio of the Chief Minister who is a respondent and that Salleh Sulong another respondent is the son of the Government Printer. Of course these facts place Sariul in a most unfortunate and embarrassing position. But it does not necessarily follow that he must give his loyalty to his son and the Chief Minister rather than loyalty to his official duties and obligations. Very strong suspicion has no doubt fallen on him in the circumstances. Dato' Marshall quite properly submitted that on the evidence there is an irresistible inference that the printing of the notices was deliberately and intentionally delayed. With respect I am unable to agree that on the evidence that that is the one and only irresistible inference. Some of the evidence on which inferences could be drawn are equally capable of a favourable construction. Whatever may be the faults of Sariul I am not satisfied that on the entire evidence that he and his subordinates deliberately and intentionally delayed the publication of the notices.

It has been said that our Ordinance is based on, though it does not follow in every detail, the English law contained in the Representation of the People Act, 1949. *Halsbury's* Laws of England, 3rd Edition, Vol. 14, page 260 has this to say about rule 14 of the Parliamentary Election Petition Rules:—

> "In other cases the service must be made on the respondent personally, unless a judge, on an application accompanied by an affidavit showing what has been done, makes an order, subject to such conditions as he may think reasonable, that what has been done shall be considered sufficient service. Such application must be made not later than five days after the petition has been presented, and before making such order the judge has to be satisfied that all reasonable effort has been made to effect personal service and to cause the matter to come to the knowledge of the respondent, including when practicable, service upon an agent for election expenses. In case of evasion of service the sticking up of a notice in the master's office stating that the petition has been presented, and also stating who is the petitioner, the prayer, and the nature of the proposed security, is to be considered equivalent to personal service if so ordered by a judge."

There is no such provision in our Rules whereby if a person evades personal service substituted service can be effected. This is entirely a matter for the legislature to consider. But I may add that the omission could be deliberate as the legislature must be aware of the English provisions.

The three petitions are stronger than *Yong Kuan Teik* v. *Devan Nair* [10] since in the latter case the respondent went as far as obtaining an order for the petitioner to deliver particulars before he took step to strike out the petition. Ismail Khan J. relied on the case of *Williams* v. *Mayor of Denby & Ors.* [11] where a notice of presentation of the petition in a municipal election was not served on the respondent in accordance with section 13(4) of the Municipal Election Act, 1872 which provides that "within five days after the presentation of a petition the petitioner shall in the prescribed manner serve on the respondent a notice of the presentation and of the nature of the proposed security and a copy of the petition . . . .". It was contended that the provisions of section 13(4) were merely directory and compliance with them was not a condition precedent to the maintenance of the petition. It was held that they were peremptory and that the terms not complied with were condition precedent, which ought to be complied with before the petition could be presented. Ismail Khan J. following that case, held that the provisions of rule 15 were mandatory and the breach thereof rendered the petition a nullity. On appeal, the Federal Court held that rule 15 was to be treated as directory and that it was not of such nature that non-compliance with it affected the validity of the acts done. [12] However, the Judicial Committee of the Privy Council decided that the Federal Court was wrong and the Election Judge was

right to say that the provisions of rule 15 were mandatory.[13]

Dato' Marshall conceded that rule 15 is mandatory and said that they are not seeking extension of time. He argued that from the circumstances as disclosed by the facts they have complied with rule 15. The petitioners rely on the principle of construction that statutory enactment must be read subject to reasonable possibility of performance. They have done everything possible and the notices could have been published on 9th June. As an analogy *Queen* v. *Justices of London & Anor.*[14] was cited. It seems to me that the analogy is not an apt one and cannot stand up on closer examination. In that case the appeal was lodged within time but the hearing could not be heard in time due to the glut of business in court. The fault did not lie with the parties but with the court. The Government Printer is not an officer of the court and if he is at fault it is not that of the court.

It is not true to say that the whereabouts of the respondents were not known. No attempt was made to serve the petitions personally on the respondents. In his supplemental affidavits dated 26th June, 1967 Chong Thian Vun swore that Tun Mustapha and Dato' Khoo were in Kuala Lumpur but thought that they were outside the jurisdiction of the court. As a result personal service which seems possible under section 7(2) of the Courts of Judicature Act, 1964 was not considered. The truth is that petitioners were doubtful that personal service was open to them as rule 15 is not as precise and clear as one would like it to be on the question of personal service. I think that is probably the reason why Ismail Khan J. in *Yong Kuan Teik* v. *Devan Nair* [10] observed that:—

"The only mode of service then, where the respondent has failed to appoint a solicitor or to leave an address for service, is publication in the *Gazette*."

By itself the first sentence in rule 15 appears to be indicative that personal service is possible. That personal service is possible seems implicit from the language used in *Devan Nair* v. *Yong Kuan Teik*[13] by Lord Upjohn when he said:—

"Rule 15 was not complied with strictly for there was no personal service and no notice in the *Gazette* within 10 days of the presentation of the petition."

Before filing the petitions Chong Thian Vun wrote to certain respondents. If I may say so, with respect, the letter would suggest that Chong was doubtful of personal service. Though common courtesy demands a reply it is, however, the privilege of a person whether he wishes to reply to such a letter or not. He may, after reading the letter, ask himself why should he reply the writer could do what he liked. Rule 10 permits but does not compel a person returned at an election to appoint an advocate and to leave an address for service prior to the presentation of any petition to which he may be made a party. To be within time petition No. 1 and petition No. 2 must be served on 9th June and petition No. 4 on 10th June. In ordinary circumstances the notices would probably be published on 15th June. Although the court could take judicial notice of the *Gazette* dated 1st June 1967 it is of no relevance. That the notices could not be published on that date cannot be disputed as paragraph 3(d) of Chong Thian Vun's affidavits in respect of petitions No. 1 and No. 2 and paragraph 4(d) in respect of petition No. 4 all sworn on 26th July 1967 show that he was so satisfied. However, since the permanent secretary to the Chief Minister had stepped in it became possible for the notices to be published in the *Gazette* extraordinary. Unfortunately from 3rd to 10th June the five lino-type machines were faulty and therefore inoperative. Consequently the notices were only set up on 10th June which was a Saturday and were not printed until 12th June.

It was vigorously contended that the petitioners had done all that was possible in the circumstances. Various *dicta* in *Mayer* v. *Harding* [15] (and cases referred therein), *Morgan* v. *Edwards*,[16] and *Devan Nair* v. *Yong Kuan Teik* [13] were cited in support. Other authorities were cited to show hardship. It was pointed out to me that whether the delay in printing was intentional or not the petitioners had exercised every diligence and that no man could be compelled to do the impossible. It was therefore urged upon me that when construing a statute I should give a "beneficial" interpretation in the sense that the mischief shall be suppressed and the remedy advanced. However it is equally important to see that the construction must not be strained to such an extent as to include cases plainly omitted from the natural meaning of the words in the statute. The court will not give effect to the authority of a statute by enforcing it indirectly in cases where it cannot be enforced directly.

As to question of time the Ordinance and Rules are clear and unambiguous. There is therefore no question *of casus omissus* in the rules. The court should approach the matter with caution where it has been urged to construe any enactment in a manner which may result in the extension of any provision of any enactment. The court should decline to interfere where a person is seeking its aid in order to relieve him against express statutory provisions which it considers to be mandatory. *Craies* on Statute Law, 6th Edition, page 71 has this to say:—

"In other words, the language of Acts of Parliament, and more especially of modern Acts must neither be extended beyond its natural and proper limit, in order to supply omissions of defects nor strained to meet the justice of an individual case."

The House of Lords has laid down in *Magor & St. Mellons Rural District Council* v. *Newport Corporation* [17] that in construing a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the legislature. Lord Simonds strongly criticised Denning L.J. on his approach to question of construction in these words:—

"'We sit here', he says, 'to find out the intention of Parliament and Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis'. The first part of this passage appears to be an echo of what was said in *Heydon's Case* 300 years ago, and, so regarded, is not objectionable. But the way in which the learned Lord Justice summarizes the broad rules laid down by Sir Edward Coke in that case may well induce grave misconception of the function of the court. The part which is played in the judicial interpretation of a statute by reference to the circumstances of its passing is too well known to need restatement; it is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament — and not only Parliament but of Ministers also — cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited:

See, for instance, *Assam Railways & Trading Co. Ltd.* v. *Inland Revenue Commissioners*,[18] and particularly the observations of Lord Wright.

The second part of the passage that I have cited from the judgment of the learned Lord Justice is no doubt the logical sequel of the first. The court, having discovered the intention of Parliament and of Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write. This proposition, which restates in a new form the view expressed by the Lord Justice in the earlier case of *Seaford Court Estates Ltd.* v. *Asher* [19] (to which the Lord Justice himself refers), cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act."

I am satisfied that the five lino-type machines were faulty and not functioning. There may be suspicion against the Government Printer but that is not enough. There is no evidence to indicate to my satisfaction that he was acting *mala fide* in the exercise of his official function. The materials for *Gazette* Extraordinary dated 9th June were set up on 27th May and printed on 9th June cannot be disputed. Although the lino-type machines were inoperative the printing machines were functioning. It is fair to say that there was an impression that printing could not be done when in actual fact set up was impossible. Further there is not a tittle of evidence to indicate that any of the respondents had in any way caused the delay in the publication of the *Gazette*. Although personal service was possible petitioners chose to effect service by publication in the *Gazette*. In the circumstances the maxim *lex non cogit ad impossibilia* can find no place. Another reason excluding the application of the maxim is that service is a condition precedent to the jurisdiction of the court. *Maxwell* on Interpretation of Statutes, 11th Edition, page 375 states:—

"Where, however, the act or thing required by the statute is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with, and if it be impossible the jurisdiction fails. It would not be competent to a court to dispense with what the legislature had made the indispensable foundation of its jurisdiction."

Thus in *R.* v. *Armitage* [20] where an Act provided that justices, at the hearing of bastardy summons "shall hear the evidence" of the mother but who died before the hearing it was held that no order could be made as the evidence of the mother was essential to the jurisdiction. The observation of Hennen J. on the question of hardship is pertinent and may be adopted:—

"With regard to the instances of hardship in which the production of the evidence of the mother may be impracticable, it is sufficient to say that these, if within the contemplation of the legislature, were probably deemed to be of such rare occurrence as not to make it expedient in their favour from the general law applicable to this particular class of cases."

There is no specific provision in the rules as to what the court should do if the machines broke down through no fault of anyone. I think the matter has to be decided in acordance with the rules as they stand. Strict compliance with the rules is necessary as rule 15 is mandatory. The facts that the notices had been sent to the Government Printer on 3rd June and that the machines broke down cannot be construed to mean that rule 15 has been literally complied with. Such a construction would mean reading words into the rule where there is no reason to do so as the rule clearly specifies the time of service. It would be wrong to strain words to meet the justice of the present case, because it might make a precedent, and lead to dangerous consequences in other cases. If there is any defect in the rule and amendment is necessary the remedy lies with the legislature. The court should not assume the function of the legislature by filling in omission which may be deliberate.

Unless there is express provision in the rules the court has no power to enlarge time. After referring to the old English O. 64 r. 7 in *Yong Kuan Teik* v. *Devan Nair*,[10] Ismail Khan J. made these observations:—

"This rule is in terms identical with our rule. But this is a rule permitting an enlargement of time appointed by these rules or fixed by an order enlarging time for doing an act or taking any proceeding. In the instant case, the time for service is prescribed, not by the Rules of the Supreme Court, but by statute, and there is no provision for enlargement of time in the Election Petition Rules."

One of the facts that influenced their Lordships to support a mandatory construction of rule 15 in *Devan Nair* v. *Yong Kuan Teik* [13] was stated by Lord Upjohn:—

"(2) In contrast, for example, to the Rules of the Supreme Court in this country, the rules vest no general power in the election judge to extend time on the ground of irregularity. Their Lordships think this omission was a matter of deliberate design. In cases where it was intended that the judge should have power to amend proceeding or postpone the inquiry it was expressly conferred upon him, see for example rules 7, 8 and 19."

In *Barker* v. *Palmer* [21] an objection was taken that the service of the summons was bad and that the county court judge had no jurisdiction to hear the case because plaintiff had failed to comply with rule 7 of Order VIII of the County Court Rules, 1875. The rule requires the summons in the case of an action to be brought to recover lands to be delivered to the bailiff forty clear days before the return day. The judge overruled the objection and tried the case, giving judgment for the plaintiff. On appeal it was held that the provision of rule 7 with respect to time of delivering the summons to the bailiff was obligatory, and not merely directory, and therefore that the judge ought not to have tried the case. Grove J. in his judgment said:—

"In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reasons given be held only directory. The rule is, that provisions with respect to time are always obligatory unless a power of extending time is given to the court, and there is no such power here."

A similar view was also expressed by the Court of Appeal in *Lee Lee Cheng* v. *Seow Peng Kwang* [22] which was approved and followed by the Federal Court in *Khoo Hean Kee* v. *Chop Wong Soon Co.* [23]

It is of great importance that election petitions should be dealt with as early as possible and decisions made in the shortest possible time. The peculiar nature of the jurisdiction and public interest in the matter demand a final determination of the matter at an early date. Such matter concerns the rights and privileges of a legislative assembly, and whether that assembly assumes to decide such matter itself or to delegate determination to a tribunal established for that purpose, the matter is such that it calls for an early and final determination. In *Devan Nair* v. *Yong Kuan Teik* [13] Lord Upjohn explained that:—

"Constitutionally decisions on questions of contested elections are vested in the assembly for which the contested election has been held, but in the course of the nineteenth century many countries including this country and many of Her Majesty's possessions overseas, adopted the view that, as the deliberations of the assembly itself were apt to be governed rather by political considerations than the justice of the case, it was right and proper that such questions should be entrusted to the courts. This required legislation in every case, and in many cases the right of appeal after the hearing of an election petition by an Election Tribunal to which those hearings were entrusted was severely limited clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment."

In order to cleanse his list an Election Judge has power to dismiss an election petition on procedural ground. The authority is the case of *Arzu* v. *Arthur* [24] where Malone, J. dealing with election petitions in British Honduras, dismissed the petitions on the grounds that they did not state on whom they were served and that the first respondent had not been made a respondent thereto. Lord Pearce, delivering the judgment of the board, made these observations:—

"Nor can they find a distinction in the fact that the dismissal of the petitions was based on procedural grounds. If the decision in this peculiar jurisdiction is to be final such finalty must apply irrespective of the reasons for the decision. The fact that no evidence has been heard does not affect the general principle. The court in the present case did not refuse jurisdiction; it decided in its peculiar jurisdiction that the petitions were defective. As a result the petitions were dismissed. A dismissal based on a procedural matter is nonetheless a decision in an election petition, even where the matter has not proceeded to the hearing of evidence."

It cannot be disputed that the notices were published in the *Gazette* Extraordinary on 12th June, 1967. There is nothing to indicate that any respondent has interfered with the normal function of the Printing Department. The permanent secretary to the Chief Minister has gone out of his way to assist Chong Thian Vun to have the notices published in the *Gazette* Extraordinary.

Having said that rule 15 was not strictly complied with in *Devan Nair* v. *Yong Kuan Teik*, [13] Lord Upjohn went on to say:—

"Although the *Gazette* is only published fortnightly, it would have been published to comply with the rule by publishing it in the issue of July 9th. So the whole question is whether the provisions of rule 15 are 'mandatory' in the sense in which that word is used in the law, i.e., that a failure to comply strictly with the times laid down renders the proceedings a nullity; or 'directory', i.e., that literal compliance with the time schedule may be waived or excused or the time may be enlarged by a judge. If the latter, it cannot be doubted that the appellant has waived literal compliance by taking a step in the action, that is, by asking for particulars of the petition."

Their Lordships held that *Williams* v. *Mayor of Denby & Ors.* [11] was rightly decided and that it strongly supported the view that the provisions of rule 15 are mandatory. Lord Upjohn continued and said:—

"On the whole matter their lordships have reached the conclusion that the provisions of rule 15 are mandatory, and the petitioner's failure to observe the time for service thereby prescribed rendered the proceedings a nullity. With all respect to the Federal Court their lordships cannot attribute weight to the circumstances that the rules contained no express power to strike out a petition for non-compliance with rule 15. When there

is a withdrawal by a party it is obviously desirable that the rules should make provision for such an event and that it should receive due publicity by publication in the *Gazette* but, if the proceedings never begin in any real sense by reason of the failure to serve the petition, there seems no compelling reason for any formal order. The election judge must, however, have an inherent power to cleanse his list by striking out or better, by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the rules."

Unless it is possible to distinguish the petitions this court has no alternative but to follow *Devan Nair* v. *Yong Kuan Teik.*[13] I am not satisfied that the petitions can be so distinguished as to take them out of the four corners of that case. For reasons given I hold that the respondents succeed on the motion on this ground.

In the light of the view I took on the question of service it would be unnecessary to go into the question of insufficiency of security. However as the matter is of some importance and out of respect to the arguments so ably put by counsel I think I should deal with it. In petition No. 1 and petition No. 4 a common ground is that the petitioner has failed to deposit sufficient sum by way of security for costs to the proper officer. Rule 12 of the Election Petition Rules, 1954 provides:-

"(1) At the time of presentation, or within three days afterwards, security for payment of all cost, charges, and expenses that may become payable by the petitioner shall be given on behalf of the petitioner.

(2) The security shall be to an amount of not less than five hundred dollars. If the number of charges in any petition shall exceed three, additional security to an amount of two hundred and fifty dollars shall be given in respect of each charge in excess of the first three. The security required by this rule shall be given by a deposit of money.

(3) If security as in this rule provided is not given by the petitioner, no further proceedings shall be had on the petition, and the respondent may apply to the judge for an order directing the dismissal of the petition and for the payment of the respondent's costs. The costs of hearing and deciding such application shall be paid as ordered by the judge, and in default of such order shall form part of the general costs of the petition."

It is not in dispute that a deposit of $500 was paid as security in respect of petition No. 1 and $750 in respect of petition No. 4. According to his calculation Dato' Abdoolcader submitted that there are at least 8 charges in petition No. 1 and at least 72 charges in petition No. 4. The proper officer is there to accept the security paid to him by a petitioner and he is not concerned as to the amount to be paid. Neither is the respondent under any obligation to advise the petitioner the amount he should pay. A petitioner should know exactly how many charges he is bringing against a respondent. Dato' Abdoolcader argued that by trying to pay additional security the petitioners are in actual fact admitting the insufficiency of security so far deposited. He said that there is express provision under rule 12 for the dismissal of a petition and that rule 12 is mandatory. He submitted that there is no question of election but that the whole petition must go.

Dato' Marshall, on the other hand, submitted that the petitioners had complied with rule 12(1) and that "security" in rule 12(2) does not mention additional security though he conceded that it might be inclusive of additional security. He said that there is no time limit and it is within the discretion of the court to allow additional security to be paid if it found the security to be inadequate. According to his calculation there are 3 charges in petition No. 1 and 62 charges (in criminal sense) in petition No. 4. There is no definition of the word "charge". But he submitted that "charge' should be equated with "ground" under section 32 of the Election Offences Ordinance, 1954 and should not be defined as in the Criminal Procedure Code. He said the fact that attempt was made by petitioners to pay additional security to the proper officer is not an act of admission but rather an act of caution. He submitted that if the court considers security insufficient it should exercise its discretion by allowing the petitioners to pay additional security within certain time failing which the petitions would be dismissed. *Baber* v. *Gamson* [25] and *Girdlestone* v. *Allan* [26] were cited. I may mention that in both cases the question arose whether the words "it shall and may be lawful" were imperative or discretionary. They were construed as giving the court a discretionary power. He also submitted that the word "shall" in rule 12(3) does not necessarily carry the meaning of imperative and cited *in re Lamb* [27] and *State of Madhya Pradesh* v. *Azad Bharat Finance Co.*[28] in support of his contention. On the other hand there are cases where the word "may" is given an imperatice meaning. See *Backwell's Case;* [29] *Baines* v. *Wormsley;*[30] *Re Eyre and Leicester Corporation.*[31] Not much help can be obtained from all these cases as they are not directly concerned with the construction of a provision of an election law. The question whether the legislature intends a provision to be mandatory or directory must depend in each case on the scope and object of the enactment. Further it is necessary to look at the general scheme of the statute and its express provisions.

Non compliance with this rule may result in the dismissal of the petition depending upon the respondent's action. The object of this rule is clearly to see that a petitioner provides adequate security for costs. In my opinion rule 12 is clearly mandatory. What was said by Grove J. in *Williams* v. *Mayor of Denby & Ors.*[11] is equally applicable to rule 12. Referring to section 13 of the Municipal Election Act, 1872, he said:-

"Then, following the provision that the petition

shall be presented within a certain time, is "At the time of presenting a petition, or within three days afterwards the petitioner shall give security for all costs . . . The security shall be to the amount of £500, and shall be given in the prescribed manner either by a deposit of money or by recognizance entered into by not exceeding four sureties, or partly in one way and partly in the other." The same peremptory language is used as in sub-section 2, the subject matter is I think sufficiently parallel — for I cannot distinguish between the materiality of the time of presenting a petition and the materiality of the time of giving security — the matter seems as important to the party in the one case as in the other, and arguments quite as strong may be applied to each."

I think I should mention the case of *Sulaiman* v. *Choong Yoon Chong*.[32] There the petitioner paid sufficient deposit within the time specified but the deposit was paid to the registrar of the Supreme Court instead of the proper officer, that is, the Supervisor of the Town Council Elections. Respondent applied for the election petition to be dismissed on the ground that no deposit by way of security for costs had been made as prescribed by the Election Petition Rules, 1954. Smith, J. thought that the action which the judge should take was entirely discretionary. He considered that as sufficient security had been paid and that there had been sufficient compliance with the spirit of the regulations it would be inequitable to refuse the petitioner a hearing of his petition. He therefore dismissed the application. That case can be distinguished from the two petitions under consideration. The Registrar of the Supreme Court is an officer of the court and he made the mistake of accepting the deposit when he should have directed the petitioner to make the payment to the proper officer. Although Smith J. did not say so in so many words his approach seems to suggest that where the mistake was that of the court, the blame should not fall on the petitioner. The question of insufficiency of security did not arise. Also the question of time did not arise. Further that case was decided before the decision of the Privy Council in *Devan Nair* v. *Yong Kuan Teik*.[13]

Rule 12(3) gives the court power to make an order of dismissal. It was said that the power is discretionary. As I read the rule it seems that the power arises only on the application of a respondent and the court must then exercise that power. It is up to a respondent whether to apply for such an order or not. *Maxwell* on Interpretation of Statutes, 11th Edition, page 235 observes:—

"So, whenever a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises and its exercise is duly applied for by a party interested and having a right to make the application, and the exercise depends, not on the discretion of the courts or judges, but upon proof of the particular case out of which the power arises."

Peremptory language is used by the rules and it behoves a petitioner to study the rules carefully so that every provision is complied with. For example, a petitioner brings ten charges against a respondent and pays $500 as security when he should pay $2,250 in all. Should the court allow such a petitioner to elect three charges out of the ten on a motion for dismissal? I think not. If a petitioner knows that he would be allowed to make an election he would every time present a petition by trumping up as many charges as possible and later electing three on a motion for dismissal. Also it would throw open the door to abusing the rule which clearly provides that "no further proceedings shall be had on the petition." The court must therefore make it clear that there shall be no question of election. It is not a question of dismissing those charges a petitioner chooses to discard but the dismissal of the petition that rule 12(3) speaks of. The early determination of such matter can only be achieved if it is final. If there is a breach of the provision of this rule, it makes no difference whether the petitioner has misinterpreted or misunderstood it he must take the risk. The respondent is entitled to take advantage of a petitioner's faults. The provisions of this rule must be strictly complied with.

It was said that not all petitioners are rich and may require more time to find the requisite security. The remedy for this lies elsewhere. The court has no power to grant exemption from payment of security or to enlarge time. The authority for the proposition that there is no power to exempt a petitioner from liability to give security is the case of *Everitt* v. *Griffiths*.[33] There a person given leave to sue as a poor person under R.S.C. O. 16, rr. 22-31, was held not exempt from liability to give security under section 119 of the Representation of the People Act, 1949. There do not appear to be any reported cases of English judicial decisions on increasing of security but there are a number of Irish cases (*Buckley* v. *Walsh*,[34] *Daly* v. *Monks*,[35] and *Redmond* v. *Manly* [36]) where increase of security was ordered. These cases do not provide much assistance as section 119(7) of the said Act empowers the court to make the security sufficient. Our rules are different. A minimum amount of security of $500 is required to cover from one to three charges. An additional amount of $250 for each charge in excess of three charges will have to be paid. So that the more charges a petitioner brings in excess of three the larger the amount of security he will have to pay. It has been said that there is no ground in law on the affidavits to support the allegation of insufficiency of security in respect of petition No. 4. Wing Kon Loo has corrected the figure $500 in his earlier affidavit to $750 by a supplementary affidavit. Paragraph 8 of his earlier affidavit reads: "I verily believe that the amount so deposited by the petition is

not in accordance with rule 12(2) of the Election Petition Rules, 1954 as the petition herein contains more than three charges." Unfortunately he has not taken the opportunity to amend the word "three". The sum of $750 must clearly cover four charges. If the amount of $750 is not in accordance with rule 12(2) it must necessarily mean that there are more than four charges. Either amendment is made or better still the power to strike out is used; otherwise the words "as the petition herein contains more than three charges" become absurd and irrelevant. The court has an inherent right to take an affidavit off the file for prolixity (*Walker* v. *Poole* [37] and *Hill* v. *Hart-Davies* [38]). It also has power to order any matter which is scandalous and irrelevant to be struck off from any affidavit (*Re Jessopp* [39]). For the purpose of determining the real issue between the parties I would strike out those words. No costs are to be allowed in respect of those affidavits.

Time has been prescribed by rule 12(1) for payment of security to cover all costs, charges, and expenses. It is therefore doubtful if the court has power to order additional security to be paid as this would in effect be extending the prescribed time for payment of security. Rule 12(2) serves as a guide as to the amount of security to be paid. The difficulty is the meaning of the word "charge". Various meanings are given in any good dictionary for this word. But what is the true meaning of the word as used in this rule? The object and intention of rule 12(2) is clear. To equate the word "charge" with the word "ground" would produce an apparent contradiction of the purpose of the rule. The word must be construed as to give a sensible meaning to the rule. The sense of the word must be such as to harmonise with the context and promote in the fullest manner the object and intention of the legislature. I think the word "charge as used means an accusation of the commission of a corrupt practice or an illegal practice at an election or an accusation of the infringement of any provision of the election law at an election. The charge may be general or specific. It is sufficient for me to say that the security in petition No. 1 and petition No. 4 are insufficient without specifying the exact number of charges. If no security is paid or the security is insufficient then it is my view that "security as in this rule provided is not given." The result is that no further proceedings shall be had on the petition and the respondent may apply for an order directing dismissal of the petition. In my judgment the respondents also succeed on the motion on this ground. The result is that the three petitions are dismissed with separate costs to respondents to be taxed on the higher scale. Moneys deposited by way of security may be applied in the payment of taxed costs. Costs to be taxed as between solicitor and client. Certificate for two counsel.

Motions dismissed.

SUCCESS ENTERPRISES LTD. v. ENG AH BOON

[O.C.J. (Winslow J.) October 3, 1967]
[Singapore — Suit No. 561 of 1966]

Landlord and Tenant — Controlled premises — Structural alterations carried out to the premises — Whether "premises" are "new" buildings when looked at as a whole — Control of Rent Ordinance (Cap. 242), s. 2.

Precedent — Whether High Court in Singapore bound by decision of Federal Court of Malaysia after separation.

There were three structures on the land occupied by the defendant when he went into occupation prior to 1947. There now remained only two structures (known as No. 44 Aroozoo Avenue, Singapore) the third having been demolished in 1961. In the present action the sole question was whether the remaining structures were built or completed after September 7, 1947. It was in evidence that the original main hut measuring 13' x 44' 6" was a dilapidated old plank and attap hut which was demolished in 1961 and a fresh structure 25' x 36' was erected in its place which incorporated new brick walls with some plank and reinforced concrete netting. It was also in evidence that the shed at the back which was 16' x 19' had been altered to 21' 8" x 16' 3½". The cost of all these operations was $3,000. On the question whether the premises No. 44 Aroozoo Avenue were controlled premises,

Held: there was ample evidence to justify the conclusion that the two old dilapidated huts have as a result of these substantial alterations made to them become, looked at as a whole, a new building in fact and therefore were not subject to the Control of Rent Ordinance.

Per Curiam: "If the burden of proof lies with the landlord (to show that the premises are not controlled premises) then the course followed by the plaintiff in this case in adducing evidence first was the correct one. If, however, the burden is on the tenant to prove that the premises are controlled, he could not have been prejudiced in any way because he would have had the advantage of hearing the landlord's case first and the landlord cannot complain that he has been prejudiced because he volunteered to give evidence first and literally asked for it."

Observations on whether the High Court in Singapore was bound by a decision of the Federal Court in Malaysia decided after the separation of Singapore from Malaysia.

Cases referred to:—

(1) *Syed Ahmed Al-Junied & Ors.* v. *Reshty* [1966] 2 M.L.J. 124, F.C.

(2) *Dadhi Ral Yado* v. *Mukat Rai* [1958] M.L.J. 193.

(3) *Mohamed bin Myddin* v. *Teo Mek Yok* [1966] 2 M.L.J. 285, F.C.

(4) *Eastern Realty Co. Ltd.* v. *Chan Hua Seng* [1967] 2 M.L.J. 195.

(5) *Kai Nam* v. *Ma Kam Chan* [1956] A.C. 358.

(6) *The Queen* v. *Cheltenham & District Rent Tribunal* Estate Gazette, October 19, 1957.

(7) *Shanon* v. *McMahon* [1945] I.R. 332.